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No. 1251

In the Supreme Court of the United States

OCTOBER TERM, 1967

JOHN C. SWAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 387 F. 2d 950.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1968. A petition for rehearing was denied on February 20, 1968. The petition for a writ of certiorari was filed on March 21, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the trial court properly received petitioner's admissions to the arresting agent.

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2. Whether petitioner was prejudiced by the receipt of a notebook and accompanying testimony showing that he had associated himself with a person with whom a Secret Service Agent had "discussed counterfeiting matters."

STATEMENT

Petitioner was convicted in the United States District Court for the District of Oregon of uttering a counterfeit obligation in violation of 18 U.S.C. 472. On December 7, 1966, he was sentenced to imprisonment for two years. The court of appeals affirmed *per curiam* (Pet. App. A).

The government's evidence showed that on July 12, 1966, a car registered in petitioner's name drove up to the Silver Inn in Salem, Oregon (Tr. 67–68, 80). While two men remained in the automobile, petitioner entered the tavern, ordered a drink, and paid for it with a ten dollar bill later proved to be counterfeit (Tr. 67–70, 96–98). A waitress decided that the bill was spurious and offered to return it to petitioner, who declined the offer (Tr. 70). Petitioner explained to the waitress that he was hitchhiking through town, and that he might have obtained the ten dollar bill at some other tavern in the city. After more questioning by the waitress, who remarked that it was unusual for the two other men in the car to wait so long for a hitchhiker, petitioner hurriedly returned to the car and left (Tr. 70–71, 74–75, 79). Two other witnesses testified to petitioner's passing of the bill at the Silver Inn (Tr. 82–84, 86–88). Other evidence showed that less than a week before trial, petitioner approached the waitress—then work-

ing at another tavern—and attempted to engage her in a conversation about the forthcoming trial, at which time he admitted being at the Silver Inn on the night in question (Tr. 76–78); that petitioner had passed similar bills in Seattle, Washington (Tr. 107–109, 118–121, 140); and that petitioner had admitted knowledge as to where such counterfeit bills could be purchased from a distributor (Tr. 145–151).

ARGUMENT

1. During petitioner's incarceration following his arrest, he admitted to Secret Service Agent Thomas Moore that the type of ten dollar bill which he had passed could be purchased, ten at a time, for $65.00, and that he knew a person residing in Portland, Oregon, who was selling the bills at that price (Tr. 145–151). These statements were ordered suppressed after a hearing outside the presence of the jury (Tr. 61–62). On cross-examination of Agent Moore, petitioner's counsel asked about the mark-up on the type of bills which petitioner had passed. Agent Moore replied, "I can tell you what the defendant told me." After defense counsel asked, "What did he tell you?", Moore replied that petitioner had stated that "It was the sale of $65 on a hundred" (Tr. 145). Petitioner made no motion to strike this testimony. On re-direct, over petitioner's objection that the line of questioning exceeded that of cross-examination, the prosecution brought out that petitioner had said he knew a person in Portland selling counterfeit money at that price (Tr. 146–151).

In these circumstances, where defendant's counsel invited reception of the suppressed testimony on cross-examination, petitioner should not be heard to invoke application of the plain error rule (F. R. Crim. P. 52(b)). See *United States* v. *White,* 377 F. 2d 908, 910-911 (C.A. 4), certiorari denied, 389 U.S. 884; *Tucker* v. *United States,* 375 F. 2d 363, 367 (C.A. 8), certiorari denied, 389 U.S. 888. The evidence brought out on redirect examination properly clarified that which was brought out on cross-examination—that is, it showed how petitioner had been aware of the going price for counterfeit obligations. This did not exceed the scope of the cross-examination.

2. At the time of petitioner's arrest, a search of his person revealed a notebook containing the entry, "Leroy, Taft, Calif." At trial, Agent Moore testified that he had received investigative reports from other agents alluding to the name "Leroy." This testimony was stricken on motion of petitioner (Tr. 125). Moore then testified, over objection on the ground of hearsay, that he had "discussed counterfeiting matters" with Leroy, whom he identified as Leroy Hults, Naylor Avenue, Taft, California. The court then admitted the notebook into evidence with instructions to the jury that they could give the exhibit whatever weight they felt it was worth (Tr. 126). No further reference was made to the notebook or Leroy. Petitioner chose not to call Leroy, who was present at the trial (Tr. 127), to the witness stand.

Petitioner contends that the reception of the notebook and the accompanying testimony constituted reversible error. It is clear in context, however, that the

evidence was introduced not merely to establish guilt by association, as petitioner first claimed on appeal, but rather to show his guilty knowledge in passing the counterfeit obligation. That petitioner knowingly associated himself with a person with whom the agent "discussed counterfeiting matters" was relevant to that issue of knowledge. Cf. *Banning* v. *United States*, 130 F. 2d 330, 336–338 (C.A. 6), certiorari denied, 317 U.S. 695. Even assuming the inadmissibility of the evidence on the ground of irrelevancy, petitioner was not prejudiced in the circumstances of this case. As noted above, three witnesses observed petitioner pass the counterfeit bill in question, and another observed him pass two similar bills thereafter. Moreover, as noted above, other evidence showed that petitioner had admitted that he knew a man in Portland who sold this type of ten-dollar counterfeit bill, ten at a time, for $65.00. In these circumstances, where the evidence showing petitioner's guilt was overwhelming, the error, if any, was harmless. F.R. Crim. P. 52(a).

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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